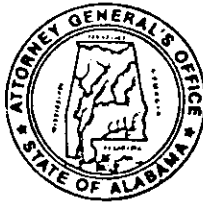


OFFICE OF THE ATTORNEY GENERAL

83-00006



CHARLES A. GRADDICK
ATTORNEY GENERAL
STATE OF ALABAMA

OCT 1 1982

ADMINISTRATIVE BUILDING
64 NORTH UNION STREET
MONTGOMERY, ALABAMA 36130
AREA (205) 834-5150

JAMES R. SOLOMON, JR.
DEPUTY ATTORNEY GENERAL
WILLIAM M. BEKURS, JR.
EXECUTIVE ASSISTANT
WALTER S. TURNER
CHIEF ASSISTANT ATTORNEY GENERAL
JANIE NOBLES
ADMINISTRATIVE ASSISTANT

Honorable Leon Garmon
Municipal Judge
City of Snead
945 Forrest Ave.
Gadsden, AL 35901

Municipalities -- Municipal
Courts -- Driving under the
influence -- Sentences

If driving under the influence
is prosecuted as offense
against a municipality, the
maximum punishment which may
be imposed on first or sub-
sequent offense is a fine of
\$500.00 and imprisonment for
not more than six months.

Dear Judge Garmon:

This office has received your opinion request
inquiring about the new DUI law (Act 82-884). Your
first inquiry is whether a municipal judge may impose
the maximum fine of \$5,000.00 and/or an 11 month and 29
day jail sentence for a third or subsequent offense.
Your inquiry is necessary because under Code of Alabama
1975, § 11-45-9 a municipal court's power of punishment
is limited to a maximum fine of \$500.00 and a maximum
jail term of six months.

Act 82-884 contains no language which removes
these limitations. Therefore, it is the opinion of
this office that where a municipality has made driving
under the influence an offense against the municipality

Honorable Leon Garmon
Page Two


the maximum punishment which may be imposed on the first or any subsequent offense is a fine of \$500.00 and imprisonment for not more than six months.

Your second question is whether the municipality must provide legal counsel to an indigent person charged with a second or third offense. In an Opinion to Honorable John B. McKinney, Jr., 148 Quarterly Report of the Attorney General 7, copy enclosed, this office held that counsel must be provided to an indigent defendant in municipal court "where imprisonment is a probability, or even a real possibility." This holding has been clarified in an Opinion to Honorable Rex K. Rainer, Director of Finance, under date of July 23, 1982, copy enclosed, in which this office held that although an indigent defendant has the right to appointed counsel for any offense where the conviction may result in the loss of personal liberty, if the offense is a minor one counsel is not necessary where there is an understanding that a jail sentence will not be imposed, even if a sentence is allowed by law. That opinion stated further that appointment of counsel for indigent defendants in such cases is within the discretion of the judge and is to be determined on a case-by-case basis.

I do hope that this response sufficiently answers your inquiry. If, however, we may be of further assistance, please do not hesitate to contact us.

Sincerely yours,

CHARLES A. GRADDICK
Attorney General
By--


CAROL JEAN SMITH
Assistant Attorney General

CJS:es

Enclosure

July 14, 1972

Hon. John B. McKinney, Jr.

Mayor of Talladega

Post Office Box 498

Talladega, Alabama 35160

Attorneys — Courts — Constitutional Law — Municipalities.

1. The Supreme Court of the United States has held that absent a knowing and intelligent waiver of counsel, an indigent defendant may not be imprisoned after conviction without counsel.

2. Since present Alabama statutes do not provide for appointment and pay of counsel in municipal courts, trial judges of such courts are authorized to appoint counsel where imprisonment is a real possibility and the municipality may make provision for reasonable compensation of such counsel whose duty it is to serve.

Opinion by Assistant Attorney General Sykes

Dear Mayor McKinney:

Your request for an opinion of this office under date of June 13, 1972, is as follows:

"I would certainly appreciate it, at this time, if your office could provide the City of Talladega with an opinion on the recent Supreme Court ruling requiring public defenders for all offenses subject to a jail sentence. Needless to say, as the Mayor of Talladega, I am somewhat concerned about the financial burden this requirement will place upon my city; and I would deeply appreciate your advice and counsel at the earliest possible moment concerning the direction or approach we should take regarding this matter."

Enclosed is a copy of the opinion of the United States Supreme Court issued June 13, 1972, *Argersinger v. Hamlin*, — U. S. — 40 L. W. 4679, holding that counsel must be provided to indigent defendants regardless of whether the offense is a felony, misdemeanor, or violation of a municipal ordinance, if imprisonment is included in his punishment.

As the Supreme Court stated it:

"We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor or felony, unless he was represented by counsel at his trial."

While the Alabama statutes provide for the appointment of and pay for counsel in cases where defendant is not able financially, or

ATTORNEY GENERAL OF ALABAMA

otherwise, to obtain counsel, this statute expressly excludes cases in Mayors' courts, recorders' courts, or other municipal courts, and the courts of justices of the peace. Act No. 2420, Acts 1971, approved October 1, 1971.

So, we have a situation where the Supreme Court of the United States has said counsel is necessary with no express statutory provision providing for counsel.

In my opinion, until the Legislature acts to provide a specific method of appointment and compensation to legal counsel, the judge of the trial court, including municipal courts, in cases wherein the Supreme Court of the United States has said counsel is necessary, has inherent power to appoint counsel to represent and defend an indigent defendant where imprisonment is a probability, or even a real possibility. It is further my opinion that the municipal governing body may make provision from its general funds for reasonable compensation to such counsel and that it is the duty of such appointed counsel, as a member of the Bar, and knowing of this Supreme Court decision, to serve to the extent possible and within reasonable limits.

Very truly yours,

WILLIAM J. BAXLEY
Attorney General

August 1, 1972

Honorable Roy Sanders
State Comptroller
Department of Finance
Division of Control and Accounts
Montgomery, Alabama 36104

Travel Expenses — State Employees — Comptroller.

1. Under the provisions of Act No. 470 of the 1969 Session of the Legislature, the so-called unit system does not apply to any part of the travel when such travel requires an overnight stay.

2. Quarterly Report of Attorney General, Volume 129, Page 42, and Quarterly Report of Attorney General, Volume 46, Page 21, are hereby overruled insofar as they conflict herewith.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

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STATE OF ALABAMA

JUL 23 1982

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Honorable Rex K. Rainer
Director of Finance
Department of Finance
Montgomery, Alabama 36130

Indigents - Attorneys -
Attorney Fees

Whether more than one attorney
is to be appointed by the
court as counsel for an
indigent defendant is within
the discretion of the judge.

Whether counsel is to be
appointed for an indigent
defendant in crimes involving
minor charges depends on ~~the~~
whether the sentence may
result in a loss of personal
liberty and is to be
determined on a case-by-case
basis.

Except in capital cases, the
sentencing of a defendant is
not a post conviction
proceeding for which the
appointed attorney can receive
fees under Code of Alabama
1975, Section 15-12-23.

Dear Mr. Rainer:

Reference is made to your request for an opinion
from the Attorney General regarding the appointment of

Honorable Rex K. Rainer
Page Two

counsel to represent indigent defendants. You specifically posed the following questions:

I am concerned over the rapidly escalating practice of trial judges appointing two attorneys from the same firm to represent an indigent. In the 1975 Code of Alabama, §15-12-(1-25), the word counsel is used and is defined in §15-12-1 as "...any attorney licensed to practice law in the state, etc..." Section 15-12-21 and others further refer to counsel as an officer of the court, a member of the bar and the attorney -- all singular. Yet §15-12-21(d) confuses the issue with the phrase, "to any one attorney in any one case." (All underscoring supplied.) See also §15-12-22(d) wherein the phrase, "...to any one attorney in any appeal..."

May a trial judge appoint more than one attorney to represent an indigent?

Another area of this Code Chapter which raises questions of doubt is that of appointments to represent so-called indigents in traffic violations when appealed to the circuit court. Does an offense of this nature, animal abuse, and other minor charges which usually upon conviction result in a fine smaller than an attorney fee qualify for appointment of counsel?

May sentencing be considered a post-conviction charge? It would appear from §15-12-22(e) that the inclusion of court time for sentencing as a post-conviction hearing and payment under §15-12-23(d) would constitute an illegal expenditure. Many attorneys are resorting to this practice and some direction is needed in this regard.

Honorable Rex K. Rainer
Page Three

As you stated in your request, Code of Alabama 1975, Section 15-12-1 through Section 15-12-25 provides for the appointment of attorneys by the court to represent indigent defendants. To answer your first question, the right of an accused to have counsel represent him is a fundamental constitutional right which has been greatly fostered and constantly upheld by the United States Supreme Court and other federal and state courts. Because the appointment of counsel is such a basic right of the accused, this office has been and is now of the opinion that the procedure of appointing counsel to represent indigent defendants is properly left to the discretion of the trial judge. Some cases involving indigent defendants who have been accused of committing crimes may involve complex legal issues and be litigation of such an intricate nature, that the judge may believe it is in the best interest of the defendant to appoint more than one attorney to represent him. The Attorney General recognizes that these court appointed attorneys are paid with state funds and that this could provide some financial difficulties for the State. Therefore, if you as Finance Director of the State are concerned about the practice of judges appointing more than one attorney to represent indigent defendants, you should discuss this matter with the Director of the Administrative Office of Courts who can bring the possible financial problems of this practice to the attention of the judges in this State.

Regarding your second question, the Supreme Court of the United States has determined that an indigent's right to appointed counsel exists when the litigant may lose his personal liberty if he loses the litigation. Lassiter v. Department of Social Services of Durham County, 452 U.S. 18 (1981), and Scott v. Illinois, 440 U.S. 367 (1979).

Thus, an indigent defendant has the right of appointed counsel for any offense whether classified as petty, misdemeanor or felony where the conviction may result in the loss of his personal liberty. However, in minor misdemeanor cases, counsel for the accused is not necessary if there is an understanding that a jail sentence will not be imposed, even if a sentence is

Honorable Rex K. Rainer
Page Four

allowed by law. Here too, the Attorney General is of the opinion that the appointment of counsel for indigent defendants in such cases is within the discretion of the judges and is to be determined on a case-by-case basis.

Turning to your last question, "post conviction proceedings" as used in Code of Alabama 1975, Section 15-12-23 means a habeas corpus or a coram nobis proceeding and not sentencing. Thus, the sentencing of a defendant is not a separate proceeding under Section 15-12-23. Therefore, it is indicated that an attorney which has been appointed as counsel for an indigent defendant cannot receive post conviction proceeding fees for the sentencing of the defendant.

However, an exception to this rule exists in capital cases in which a defendant is convicted of a capital offense and receives a separate sentence hearing to determine whether he should be sentenced to death or life imprisonment without parole. The entire sentence proceedings held after a defendant is convicted of a capital offense should be treated as a post-conviction proceeding for purposes of additional payment under Code of Alabama 1975, Section 15-12-23. There are two reasons why additional payment should be permitted for capital punishment sentence proceedings when it is not permitted for sentence proceedings in felony cases including habitual offender cases. First, capital punishment sentence proceedings almost always involve what amounts to another jury trial on the issue of punishment, and they usually entail much more work than any other type of sentence proceedings. Secondly, the United States Supreme Court has repeatedly recognized that different standards apply in capital cases, and the State has a special interest in ensuring adequate representation in a capital sentence proceeding.

Therefore, it is the opinion of this office that sentence proceedings in non-capital felony cases, including habitual offender cases, should not be considered a "post conviction proceeding" for purposes of additional compensation under Code of Alabama 1975, Section 15-12-23, but sentence proceedings in capital cases should be.

Honorable Rex K. Rainer
Page Five

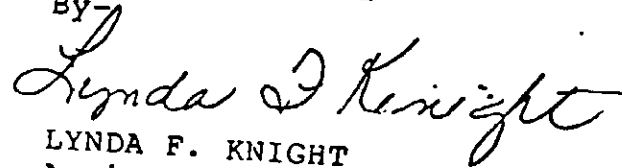
I hope that your questions have been adequately answered.

If our office can be of assistance in the future, please contact us.

Sincerely,

CHARLES A. GRADDICK
Attorney General

By-

A handwritten signature in cursive script, reading "Lynda F. Knight".

LYNDA F. KNIGHT
Assistant Attorney General

CAG/LFK/ks